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IN THE

Supreme Court of the United States

October Term, 1942.

No. 1090 99

ILLINOIS STEEL COMPANY,
Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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I.

The Opinion of the Court Below.

The opinion of the Appellate Court of Illinois, First District, is reported in 316 Illinois Appellate, 516, and in 46 Northeastern Reporter 2nd, 144.

II.

Summary and Short Statement of the Matter Involved.

This was an action at law brought by respondent to recover of petitioner a balance of freight charges due on a number of shipments of sulphate of ammonia made by petitioner as consignor from its plant at Gary, Indiana, to the Wholesale Phosphate & Acid Works, Inc., at Baltimore, Md., as consignee, for export. The carriers, upon being advised that the said shipments were for export, demanded payment of their charges in advance on the basis of the

export rate, and had no notice or knowledge that said shipments after delivery to the consignee would be so handled as to make inapplicable the export rate and make applicable the higher domestic rate. Petitioner prepaid the charges on the said shipments at the export rate and also signed the "no recourse" clause of each bill of lading. The Appellate Court of Illinois found that the "no recourse" clause was not applicable to the said shipments and that respondent is entitled to recover the difference between the domestic rate and the export rate on the shipments delivered within three years prior to the institution of the suit.

III.

Reason Why the Writ Should Not Be Granted.

The decision of the Appellate Court of Illinois in the case at bar is in accord with applicable decisions of this Court.

IV.

Points and Authorities.

The signing by petitioner of the "no recourse" clause of the bill of lading did not bar respondent's right to demand payment of its proper lawful tariff charges from petitioner.

L. & N. R. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59.

Chesapeake & Ohio R. R. Co. v. *Glogora Coal Co.*, 169 S. E. 417 (Certiorari denied by U. S. Supreme Court, 290 U. S. 698).

New York Central R. R. Co. v. *Union Oil Co.*, 53 Federal (2nd) 1066.

Atlantic Coast Line Ry. Co. v. *Bristol Steel & Iron Co.*, 30 Federal Sup. 726.

Davis v. *Keystone Steel & Wire Co.*, 317 Illinois 280.

Chicago Great Western Ry. Co. v. *Hopkins, et al.*, 48 Fed. Supp. 60.

V.

Argument.

The Petition Presents No Grounds for the Granting of the Writ and Should Be Denied.

Petitioner bases its petition upon the assertion that "the rule announced by Appellate Court in the case at bar conflicts with the decisions of the Court in *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 66, and of the Federal District Court in the case of *Chicago Great Western Ry. Co.* v. *Hopkins, et al.*, 48 Fed. Sup. 60."

We respectfully submit that there is no foundation for petitioner's assertion. On the contrary, the opinion rendered in the case at bar shows on its face that the Appellate Court was guided by the decisions of this Court in arriving at its conclusion that petitioner is liable for the charges which respondent is here seeking to recover. Thus, the Appellate Court states (R. 58-62):

> "Section 7 of the Conditions of the Bills of Lading provides that the consignor 'shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges.' Further along in Section 7 appears the following: 'Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges.' It is clear that in the bill of lading the carrier reserves the right to demand prepayment of its charges. Having this right, it follows that the shipper is obligated to pay such charges where the demand is made. Each bill of lading carried the provision signed by the shipper that 'the carrier shall

not make delivery of this shipment without payment of freight or all other lawful charges.' It is evident that the language 'nothing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges,' limits the right of the shipper in the exercise of the privilege granted by the 'no recourse' clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the 'no recourse' clause could not be construed as giving the shipper the right to deprive the carrier of its charges. In the *Central Iron Company* case the Supreme Court pointed out that the carrier was at liberty to require prepayment of the freight charges. Our inquiry then should be directed to ascertaining whether the carrier did exercise its right to require at the time of each shipment the prepayment of the charges. It will be observed that each of the bills of lading contains the following: 'If charges are to be prepaid, write or stamp here "To Be prepaid."' The words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each bill of lading. The parties stipulated that at the time of making each shipment the initial carrier demanded the freight thereon in the amount set forth under the heading: 'Amounts paid by defendant' in Exhibit 'A' of the amended complaint, and that the defendant prepaid said amounts to the initial carrier as required by the bill of lading, and that the initial carrier transported each of the shipments to Curtis, Indiana and there delivered each of the shipments to the plaintiff. The stipulation further provides that 'the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52.' This sum of $3,675.52 is the difference between the export rate and the domestic rate. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who has assumed an obliga-

tion to pay the charges. The initial carrier insisted on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account. The initial carrier could not demand payment of the domestic rate until it appeared that the shipments would not take the export rate. Each bill of lading recited that the merchandise was 'for export,' and that the freight rate was prepaid at 28¢ per 100 pounds to Baltimore. The parties knew that this was the export rate. It is plain that the initial carrier was demanding and the shipper was prepaying the charges, and that each understood that the export rate was applicable. Following the direction of the bill of lading that "if the charges are to be prepaid, write or stamp here "To Be Prepaid,"' the words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each such shipment. We are satisfied that when the initial carrier demands that the charges be prepaid, which it has a clear right to do, that the 'no recourse' clause is not applicable. Defendant points out that the shipper has the right to prepay any part or all of the charges if he wishes, and that it is a common practice for the consignor to prepay part of the charges and for the carrier to collect the remainder of the charges from the consignee. Nevertheless, the carrier can insist upon its right to require prepayment of its charges. Where a carrier accepts part payment of its charges from the consignor, that, of course, would not be a prepayment. At most it would be a prepayment of part of the charges. In a case where the railroad company accepted part payment of the charges and the shipper signed the 'no recourse' stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges. In such a situation it is manifest that the carrier would not be demanding prepayment of its charges. It would be a contradiction to say that the railroad company insisted on the charges being prepaid and that the shipper could not be required to pay any deficiency if the proper charges were not collected. When a shipper is required to prepay

the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity. We are of the opinion that the 'no recourse' clause is not applicable to the situation covered by the stipulation.

While it is true that the commodity shipped was Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect itself by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate & Acid Works, Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of delivery. We agree with the plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At the time the defendant designated the shipments as for export and defendant prepaid the charges at the export rate. A subsequent examination as to the handling of the shipments revealed that the export rate was not applicable. A fundamental error in defendant's reasoning is that it fails to appreciate

that the carrier has the right to insist upon the prepayment or guarantee of the charges, for by the express terms of Section 7 of the Conditions of the Bills of Lading, nothing therein 'shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges.' Where the carrier manifests an intention to demand prepayment of the charges, the signing of the 'no recourse' stipulation by the shipper is ineffective. Defendant suggests that if it had been the intention of the framers of the Uniform Bill of Lading to make the 'no recourse' clause inapplicable to shipments marked 'To Be Prepaid,' they would have expressly provided in Section 7 that the 'no recourse' clause should not apply in cases where the prepaid clause of the bill of lading has been executed. Defendant insists that both the 'prepaid' and 'no recourse' clauses can be given effect and that the court should construe the bill of lading contract so as to give effect to all of its provisions. The law requires a shipper to pay all of the charges in advance if demand therefor is made by the carrier. Delivery of the shipment does not change the primary obligation of the shipper to pay the charges. Where the carrier insists on prepayment of the charges the shipper cannot by signing the 'no recourse' stipulation, avoid its obligation to pay all of the charges, and if through some mistake all of the charges are not collected in advance, the liability of the shipper to pay persists."

There is, therefore, no justification for petitioner's assertion that the opinion of the Appellate Court conflicts with the opinion of this Court in *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59. On the contrary, the Appellate Court expressly recognized and applied the holdings in the *Central Iron Company case* that "The carrier was at liberty to require prepayment of freight charges (66)" and "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate

to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges (65)."

The decision of the Appellate Court is also in harmony with the decision of the District Court for the Western District of Pennsylvania in the case of *New York Cent. R. Co.* v. *Union Oil Co.*, 53 Fed. (2d) 1066. For the very question presented here was there considered and the court held that the shipper of a prepaid shipment was not relieved from liability for the excess of the legal rate over the amount collected by his having signed the "no recourse" stipulation of Section 7 of the bill of lading. Thus the Court stated at page 1067:

"* * * The questions are as follows:

"1. Where a carrier furnishes a consignor with a written rate quotation which is less than the published tariff rate, and on the basis of such quotation accepts and delivers to the consignee a prepaid shipment under a bill of lading which provides by signed stipulation that there shall be no recourse on the consignor if delivery is made without collecting from the consignee all freight and lawful charges, may the carrier, who through error has failed to collect the undercharge from the consignee, compel the consignor to pay the difference between the rate prepaid and the published tariff rate?

* * * * *

"Our answer to each question is in the affirmative, in so far as the questions apply to the facts of the instant case. The consignor was the owner of the goods shipped and the transportation ordered was on its own behalf. Under such circumstances, the consignor is primarily liable even where the bill of lading contains a provision imposing liability upon the consignee. *Louisville & N. R. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900. * * *

"In the instant case no doubt can exist, we think, as to the liability of the shipper. As to eight of the shipments, it is plain that the consignor, by the bill of lading, contracted to pay the freight charges." * * *

To the same effect is the decision in *Chesapeake & Ohio Ry. Co.* v. *Glogora Coal Co.,* 169 S. E. 417 (certiorari denied by U. S. Supreme Court, 290 U. S. 698), where the Court likewise held that the execution of the stipulation under Section 7 of the bill of lading does not relieve the shipper or consignor of liability for the payment of the proper freight charges on prepay shipments. In disposing of the contention of the Coal Company that it had executed the "no recourse" clause of Section 7 of the bill of lading and consequently could not be held liable for any freight charges, the Court held:

> "* * * we are of opinion that in determining whether there was primary obligation upon the consignor to pay the freight, controlling effect must be given to the above mentioned requirement of the published tariff that freight charges on shipments to a nonagency station should be prepaid.
>
> "To the suggestion of the consignor that the requirement of the tariff for prepayment of freight is indefinite and does not place any greater liability on the consignor than it does on the consignee for such prepayment, the reply seems obvious that the party who procures the services of a carrier to transport freight to a prepay station does so on the basis of statutory requirements. The primary obligation logically rests upon him who procures the service to be performed, especially where it does not appear that he was procuring the service for and on behalf of some other person. No contract entered into at the time of shipment can alter requirements of the law."

The courts have uniformly held that it is the duty of the carrier to collect its lawful charges and "the terms of every contract of shipment, so far as the service to be rendered and the compensation to be received are concerned, are fixed by the schedule filed with and approved by the Interstate Commerce Commission. No agreement of the parties can modify these terms, though expressed in writing and actually performed. The collection by the

carrier of less than the schedule rate, though expressly agreed on, will not prevent the recovery of the shortage from the schedule rate. The rates defined by the tariff cannot be varied or enlarged by either contract or tort by the carrier." *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 280; *A. C. L.* v. *Bristol Steel & Iron Works*, 30 Federal Supp. 726.

The decision of the Appellate Court in the case at bar is, therefore, in accord with the decisions of this Court and of other courts, both state and federal.

Petitioner, at page 12 of its petition under Paragraph B, argues that the place where the carrier delivered the shipments in issue made the export tariff inapplicable and that it knew or should have known that it was not making the deliveries required by the export tariff. This argument disregards the established fact that a carrier is required to make delivery in accordance with the instructions of the bills of lading; it has no control over the actions of the consignee. There is nothing in the tariff which would require the carrier to withhold delivery merely because it might anticipate that the consignee would not meet the requirements of the export tariff. The Stipulation of Facts recited (R. 17) that the bills of lading specified the following:

> "Consigned to Standard Wholesale Phosphate & Acid Works, Inc. Destination—Curtis Bay—Baltimore, State of Maryland. Route—E. J. & E., Curtis, B&O—for export."

The carrier was required to follow these shipping directions; it had no power or right to withhold this shipment in anticipation that the consignee might not export the shipments or handle them in accordance with the export tariff. Its directions were to deliver to Standard Wholesale Phosphate & Acid Works, Inc., Curtis Bay, Baltimore, Maryland. These directions were followed. The fact that the shipments were delivered at buildings used by consignee for storing, mixing and bagging commodities mov-

ing in both domestic and export commerce does not afford any warrant for petitioner's claim that the railroad was charged with knowledge that the domestic rate would be applicable. For the Stipulation of Facts expressly provides (R. 16) that the buildings in question "branch onto or abut wharves at which steamers are berthed for receiving and discharging cargoes" and finally that the shipments were actually loaded into steamers alongside these wharves. The instructions to deliver at the buildings, therefore indicated at least as forcibly that the consignee intended to handle the shipments directly through the buildings, across the wharves and into the steamers berthed thereat. Indeed, that would be the natural and proper assumption from the fact that the shipments were billed for export and storing, bagging and mixing were not authorized under the tariffs naming export rates.

Petitioner, on page 13 of its petition, under paragraph C, states: "There was prepayment of part of the charges on each shipment made. Each bill of lading (R. 18) contained the following statement *signed by the initial carrier* (italics ours):

> 'Received $.................... to apply in prepayment of the charges on the property described hereon.
>
> ....
>
> *Agent of Cashier.*
>
> Per..
>
> (The signature here acknowledges only the amount prepaid.)' "

Petitioner's assertion that the foregoing receipt was "signed by the initial carrier" is not in accord with the facts. For the Stipulation (R. 14-21) does not recite that the receipt was signed by the initial carrier or by any other carrier. On the contrary, it clearly appears that the receipt was not signed by anyone. However, Petitioner's

contention that there was only prepayment of "part" of the charges on each shipment was properly dismissed by the Appellate Court with this statement (R. 59-60):

> "The initial carrier insisted on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account."

Conclusion.

We submit that there is no conflict between the decision of the Appellate Court of Illinois in the case at bar and the decisions of this Court and that the decision of the Appellate Court is based on both the law and the facts in the case. The petition should, therefore, be denied.

Respectfully submitted,

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